STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of J.F. and B.A.L., Minors.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

KRISTIE ALICIA BINERT LEWIS,

Respondent-Appellant,

and

ROBERT RAY LEWIS,

Respondent.

UNPUBLISHED
April 29, 2003

No. 241798
Washtenaw Circuit Court
Family Division
LC No. 00-024977-NA

In the Matter of B.A.L., Minor.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

ROBERT RAY LEWIS,

Respondent-Appellant,

and

KRISTIE ALICIA BINERT LEWIS,

Respondent.

No. 242106
Washtenaw Circuit Court
Family Division
LC No. 00-024977-NA

Before: Whitbeck, C.J., and Cavanagh and Bandstra, JJ.

PER CURIAM.

In Docket No. 241798, respondent-mother appeals as of right the termination of her parental rights to the minor children, BAL and JF, pursuant to MCL 712A.19b(3)(c)(i) and (ii), (g) and (j). In Docket No. 242106, respondent-father appeals by delayed leave granted the termination of his parental rights to BAL pursuant to MCL 712A.19b(3)(c)(i) and (ii), (g) and (j). The appeals have been consolidated for consideration by this Court. We affirm.

Respondents challenge the trial court's findings concerning the statutory grounds for termination and the best interests of the children. To terminate parental rights, the trial court must find that a least one of the statutory grounds for termination in MCL 712A.19b(3) has been met by clear and convincing evidence. *In re Sours Minors*, 459 Mich 624, 632-633; 593 NW2d 520 (1999). If the court determines that a statutory ground for termination has been established, it must terminate parental rights unless there exists clear evidence, on the whole record, that termination is not in the child's best interests. MCL 712A.19b(5); *In re Trejo Minors*, 462 Mich 341, 353; 612 NW2d 407 (2000). We review the trial court's decision to terminate parental rights for clear error. *Sours*, *supra* at 633. "To be clearly erroneous, a decision must strike us as more than just maybe or probably wrong." *Id*. Due regard is given to the special ability of the trial court to judge the credibility of the witnesses before it. MCR 2.613(C).

Initially, we note that respondent-father does not challenge the trial court's determination with regard to § 19b(3)(c)(i). As such, this Court properly may assume that the trial court did not clearly err in finding that this statutory ground was established by clear and convincing evidence with respect to respondent-father. *In re JS and SM*, 231 Mich App 92, 98-99; 585 NW2d 326 (1998), overruled on other grounds by *Trejo*, *supra*. In any event, we are satisfied that the trial court did not clearly err in finding that termination was warranted under § 19b(3)(c)(i), with respect to both respondents. The children were removed from respondents' care because of domestic violence and substance abuse. Although respondents made some progress in addressing their substance abuse problems, the problem of domestic violence was never rectified. The volatile and abusive nature of the respondents' relationship and use of alcohol in violation of the court's orders were amply demonstrated in a recorded telephone call to 911 less than a month before the termination hearing. Although respondents claimed that they had discontinued their relationship and intended to divorce, the history of their continuing relationship despite repeated problems with domestic violence gave reason to believe otherwise. In light of respondents' past history and failure to sufficiently address the issue of domestic violence during the period the children were in foster care, the trial court did not clearly err in determining that this condition was not reasonably likely to be rectified within a reasonable period of time considering the children's ages. MCL 712A.19b(3)(c)(i).[1] For the same reasons, the trial court's determination that there was a reasonable likelihood the children would be harmed if returned to respondent's care was not clearly erroneous. MCL 712A.19b(3)(j).

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[1] Although the court also referred to § 19b(3)(c)(ii), that subsection was not alleged in petition requesting termination of respondents' parental rights. However, having determined that termination was proper under § 19b(3)(c)(i), we need not further consider § 19b(3)(c)(ii).

Regarding § 19b(3), the trial court did not clearly err in finding that this subsection was established with respect to respondent-mother considering her failure to obtain adequate, long-term housing and employment. The trial court also did not clearly err in finding that this subsection was established with respect to respondent-father, given the evidence that he choked and threatened to kill respondent-mother, thereby putting himself at risk of incarceration. Accordingly, given the absence of clear evidence that termination was not in the children's best interests, the trial court properly terminated respondents' parental rights to the children. MCL 712A.19b(5); *Trejo, supra*.

Respondents also both argue that they were denied the effective assistance of counsel because they were jointly represented by the same attorney at a review hearing and permanency planning hearing despite a conflict of interest. We review an ineffective assistance of counsel claim de novo, applying by analogy principles developed in the criminal law context. *In re CR*, 250 Mich App 185, 197-198; 646 NW2d 506 (2002). Here, we are not persuaded that an actual conflict of interest existed during the time of the joint representation. Furthermore, respondents have not demonstrated that any alleged conflict adversely affected their attorney's performance. See *People v Smith*, 456 Mich 543, 556-557; 581 NW2d 654 (1998). In other words, respondents have not "demonstrated harm." *In re Osborne*, 459 Mich 360, 369; 589 NW2d 763 (1999). Moreover, we reject respondents' contention that counsel's performance was deficient for allegedly failing to advise them to discontinue their marital relationship.

Finally, respondent-mother's argument that the trial court compelled her to withdraw her request for an adjournment at the permanency planning hearing is not supported by the record. Rather, the record indicates that counsel withdrew her request for an adjournment following a discussion in chambers. Because the court did not deny the request, there is no adverse ruling for this Court to review. To the extent that respondent-mother argues that the court refused to allow a therapist to be called as a witness, the reason the witness did not testify is not apparent from the record. Because we may not speculate that the court refused to allow the witness to testify, this issue does not afford a basis for relief. Cf. *Rockwell v Hillcrest Country Club, Inc*, 25 Mich App 276, 288-289; 181 NW2d 290 (1970).

We affirm.

/s/ William C. Whitbeck
/s/ Mark J. Cavanagh
/s/ Richard A. Bandstra